IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO. 434 OF 2005

Shankar Swaroopchand Agarwal & anr. ... Appellants.
Versus.
Swaroopchand Agarwal & anr. ... Respondents.

Shri H.K.Gada with Shri Pradeep Sancheti i/by
M/s.Harakchand & Co. for the Appellants.

Shri M.M.Vashi with Shri Santosh Shetty i/by Shri
M.P.Vashi for the Respondents.

CORAM : ABHAY S. OKA, J.

DATED : 6th May, 2005.

P.C.:

1. The learned Counsel appearing for the parties state that the parties met in presence of Shri Rohit Kapadia, Senior Advocate, and Shri M.M.Vashi, Advocate, for finding an amicable settlement of the dispute. The learned Counsel stated that it is not possible to resolve the dispute. Shri Vashi appearing for the Respondents states that his clients are of the opinion that the demands of the Appellants are exorbitant. Considering the submissions of the learned Counsel appearing for the parties, I find that there is no possibility of amicable settlement and, therefore, I have taken up the appeal for hearing.

2. This is a very unfortunate dispute between the Appellant No.1 and his parents who are Respondents. The Appellant No.2 is the wife of the Appellant No.1. Due

to the dispute between the parties, the Respondents were forced to approach the Court of law by filing a civil suit. The dispute is as regards the residential bungalow in which the members of the family of the parties are residing. The case of the Respondent is that the Respondent No.2 i.e. the mother of the Appellant No.1 is owner of the bungalow. The Respondents have been residing in the said bungalow along with the family of the Appellant No.1 and the family of another son of the Respondents. The case of the Respondents is that the Appellant No.1 and his family were allowed to stay in the bungalow as the Appellant No.1 happens to be their son. The case made out in the plaint is that due to intolerable conduct of the Appellants and frequent quarrels with the Respondents and other members of the family, it is not possible for the Respondents to permit the Appellants to stay in the residential bungalow. Therefore, the suit is filed for declaration that the Appellants have no right title and interest in the residential bungalow. The prayer for perpetual injunction is made restraining the Appellants from entering upon and residing in the said residential bungalow.

3. By the impugned Judgment and Order passed on the Notice of Motion taken out by the Respondents, the trial Court has granted ad-interim relief in terms of prayer clause (a). Prayer clause (a) reads as under:

(a) That pending the hearing and final disposal of the suit, the Defendants be restrained by an order and injunction of this Honourable Court from entering upon or residing in the said bungalow situate at 36, Hare Krishna, Sion Trombay Road, Chembur, Mumbai 400 071."

4. The learned Counsel appearing for the Appellants submitted that the lease of the plot is taken by the Hindu Undivided Family in the name of the Respondent No.2 i.e. the mother as a mark of respect. In fact the leasehold rights are acquired by the Hindu Undivided Family of which the Appellant No.1 is a member. He submitted that there was a business of the Hindu Undivided Family of steel rolling commenced in the year 1972. He submitted that out of the income from the said Joint family business, a part of the suit bungalow was constructed in the year 1977-78 and remaining part was constructed in the year 1981-82. He submitted that the Appellant No.1 and his family members have right to reside in the bungalow as a member of the Hindu Undivided Family and the Appellants are occupying part of the bungalow. He submitted that the Appellants have three children who are taking education. He submitted that such harsh order of throwing them out of the premises at interim stage should not have been passed.

5. The learned Counsel for the Respondents has supported the impugned Judgment and Order. He has pointed out the stand taken by the Appellants in the affidavit-in-reply filed in the trial Court. He has submitted that only because of the situation created by the Appellants by their conduct and behaviour, the Respondents were required to take the unpleasant step of filing the suit and taking injunction against them.

6. I have considered the rival submissions. It is not in dispute that the Appellant No.1 was born in the year 1963. Therefore, if the acquisition of the plot has taken place in the year 1972, his age at that time was only 9 years. The first phase of the construction was completed in the year 1977-78. By that time the age of the Appellant No.1 was only 14 to 15 years and when the last phase was completed, his age was about 18 years. It is, therefore, impossible to come to the conclusion that the Appellant No.1 has contributed to the business and from the income of such business there is acquisition of the plot and construction of the bungalow. It is necessary to refer to the averments made in the affidavit-in-reply. In paragraph 13 of the affidavit-in-reply of the Appellants, it is stated that the suit plot has been taken in the name of the Respondent No.2 as a mark of respect to her and the Respondent No.2-mother is benami of the said HUF. It is

stated in the affidavit-in-reply that the Appellants are in sole and exclusive possession of certain part of the said bungalow.

7. The learned trial Judge has recorded a prima-facie finding that the property cannot be of the Hindu Undivided Family. The learned trial Judge has therefore recorded a prima-facie finding that the Appellants have no right, title and interest in respect of the said bungalow. The learned trial Judge has also considered a decision of this Court reported in 1996 (2) Mah.L.J. page 208 (Conrad Dias v/s. Joseph Dias).

8. The learned trial Judge considered the fact that due to the frequent quarrels and conduct on the part of the Appellants the peace in the house is being disturbed. Considering the fact that the age of the Respondent No.1-father is 72 years and the Respondent-mother is 68 years, the learned trial Judge has passed a drastic order of interim relief with a view to ensure that there is a peace for the Respondents at this advanced age.

9. The order passed by the learned trial Judge is a discretionary order. Considering the prima-facie material on record, it cannot be said that the exercise of discretion by the learned trial Judge is perverse. In my view no interference is called for in the impugned Judgment and order.

10. At this stage the learned Counsel appearing for the Appellants states that the children of the Appellants are taking education in the city of Mumbai and the Appellants have no other accommodation in Mumbai. He states that the Appellants are ready and willing to give undertaking to remove themselves from the suit property provided time to remove themselves from the suit property of six months is granted. The said request is opposed by the learned Counsel appearing for the Respondents. In my view when the Appellants on their own have shown willingness to move out of the suit property, the request deserves to be granted. The Appellants are staying in the suit property with their children and the Appellants have to be granted reasonable time for acquiring another accommodation. The learned Counsel appearing for the Appellants on instructions state that one daughter of the Appellants has attained majority and other daughter and son are still minors. It is made clear that the action of the Appellants to remove themselves from the suit property will be naturally subject to the final result of the suit and without prejudice to their rights and contentions in the pending suit.

11. Hence the following order is passed:

(i) The Appeal is dismissed with no order as to costs.

(ii) If the Appellants and their major daughter file an undertaking in this Court within a period of two weeks from today to remove themselves along with the minor son and daughter of the Appellants from the suit premises within a period of six months from today, the impugned Judgment and order will remain stayed for a period of six months. It is made clear that if the undertaking is filed and if the order of stay operates, the Appellants will continue to occupy the suit property without causing any nuisance to the Respondents.

(iii) In case the undertaking is not filed within the period of two weeks from today, the order of stay will not operate and the interim relief granted by the trial Court will come into operation forthwith.

(iv) It is made clear that the action of the Appellants to remove themselves from the suit property along with their children will be without prejudice to their rights and contentions in the pending suit.

(v) It is needless to say that the observations which are made by the learned trial Judge in the impugned Judgment and order are only tentative observations for the limited purpose of considering the prayer for grant of interim relief and the pending suit will be decided by the learned trial Judge on its own merits without being influenced by the said observations. It is also made clear that the tentative findings which are recorded in this order are only for the limited purpose of considering merits of this Appeal and the learned trial Judge will decide the suit independently of the said findings.

(vi) The parties and the trial Court will act on an authenticated copy of this order.

Judge.